Nos. 94-1893 and 94-1896

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Supreme Court of the United States

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UNITED STATES OF AMERICA, *et al.*,

Petitioners,

—v.—

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *et al.*,

Respondents.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,

Petitioner,

—v.—

BELL ATLANTIC CORPORATION, *et al.*,

Respondents.

ON WRITS OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF VIRGINIA IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The ACLU of Virginia is its statewide affiliate.

Throughout its seventy-five year history, the ACLU has been particularly concerned about the relationship between government regulation and free speech, and has insisted that government efforts to regulate speech be rigorously justified. Recently, for example, the ACLU filed an *amicus* brief in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. __, 114 S.Ct. 2445 (1994), urging the development of a fuller factual record -- a position that this Court ultimately adopted. In this case, the government once again seeks to regulate speech in the name of diversity. Because these issues are of direct concern to the ACLU and its members, we respectfully submit this brief to assist the Court in resolving the important questions presented.

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Appeals for the Fourth Circuit declaring that 47 U.S.C. §533(b) violates the First Amendment. *Chesapeake & Potomac Telephone Company v. United States*, 42 F.3d 181 (4th Cir. 1994). Section 533(b), which was enacted in 1984 as part of Congress' comprehensive regulation of the cable industry, forbids a local telephone company (referred

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

to in the government's papers as an LEC) from directly providing video programming to viewers in its local community either through its own telephone wires or over a cable system owned, operated, or controlled by the telephone company.[2]

According to the government, Congress feared that if a local telephone company were permitted to provide video programming in its local service area, it would be in a position to use its monopoly over local telephone service to unfairly subsidize its video operations by improperly allocating video costs to telephone operations. In addition, Congress apparently feared that if local telephone companies were permitted to enter the video market as full-fledged competitors, they would be tempted to sabotage the signals of competitors who had no choice but to transmit over telephone company property.

Section 533(b) had its genesis in a 1970 FCC study made during the infancy of the cable industry and a decade before the breakup of the Bell system, warning that the vulnerable new CATV industry might be stifled if local telephone companies were permitted to offer the same service.[3] *See* 21 F.C.C.2d 307 (1970). In 1984, Congress enacted §533(b), adopting the 1970 FCC rules, apparently without considering whether the emergence of cable as a powerful

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[2] The operative language of the statute forbids a local telephone company from "provid[ing] video programming directly to subscribers in its telephone service area." 47 U.S.C. §533(b)(1).

[3] The 1970 regulations were reaffirmed by a 1980 FCC staff study released on the eve of the breakup of the Bell system. *FCC Policy on Cable Ownership: A Staff Report* 141-178. Significantly, every FCC study since the breakup of the Bell system has recommended abolishing the speech restrictions on local telephone companies at issue in this case.

industry, or the breakup of the Bell monopoly, had so changed the circumstances that censorship of the local telephone companies was unwarranted.[4] Three years later, the FCC renewed its study of the issue and concluded, in a series of reports from 1987 to 1994, that the existing censorship regime was no longer justified. *See* 2 F.C.C. Rcd. 5092 (1987); 3 F.C.C. Rcd. 5849 (1988); 7 F.C.C. Rcd. 300 (1991); 7 F.C.C. Rcd. 5781 (1992), *modified in part on reconsideration*, 10 F.C.C. Rcd. 244 (1994). Despite the prodding of the FCC, however, Congress declined to repeal §533(b).[5]

Confronted by a statute whose underlying rationale had been expressly disavowed by the relevant administrative agency, respondents sued on First Amendment grounds. In response, the district court invalidated §533(b) as underinclusive because it permitted a local telephone company to offer its lines to transmit the speech of third persons, creating the same danger of anticompetitive behavior against competitors who do not sign up with the phone company but must use its facilities. 830 F.Supp. 909.

The Fourth Circuit affirmed, holding that the risks perceived by Congress did not justify a flat ban on speech. Specifically, the court ruled that a flat ban was not a nar-

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[4] Since Congress made no effort to make factual findings explaining its action, the most reasonable assumption is that it was based on the 1970 FCC study.

[5] The closest Congress came to providing an explanation for its refusal to repeal §533(b) was a 1990 Senate Report describing concerns about the "potential" for anticompetitive practices and the need for media diversity. S. Rep.No. 456, 101st Cong., 2d Sess. 9 (1990). How "media diversity" is advanced by barring telephone companies from competing with existing cablecasters and over-the-air broadcasters was not explained.

rowly tailored way of dealing with Congress' legitimate regulatory concerns and that permitting local telephone companies to produce programs for transmission on someone else's facilities was not a constitutionally adequate alternative. 42 F.3d 181.

On May 16, 1995, the FCC sought to repeal §533(b) unilaterally by announcing that it would use its waiver powers to permit a local telephone company to offer video service in its local community, as long as a significant cable competitor existed. *F.C.C. Third Report and Order* (May 16, 1995).[6] While the FCC's newly minted reading of the Act may ameliorate the effect of §533(b), it hardly solves the constitutional problem. First, the new waivers are wholly discretionary. Second, they come with a number of strings. Third, they do not permit a telephone company to purchase an existing cable system. Fourth, and most importantly, the FCC's controversial current reading of the statute's waiver provision is subject to change with every shift in personnel. No long-term plans can be made in reliance upon such a thin reed.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Despite the close link between speech and amplifying technology, the precise legal relationship between the two concepts has always presented difficult constitutional issues. At times, this Court has uncoupled technological amplification from speech, permitting regulation of amplification technology despite an adverse impact on the speaker. *E.g.*,

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[6] Ironically, the FCC's order permits local telephone companies to offer video programming only in those settings where the danger of anticompetitive conduct exists.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Kovacs v. Cooper*, 336 U.S. 77 (1949). At other times, the Court has merged the two concepts, treating the effort to regulate amplification technology as though it were an effort to censor speech itself. *E.g., Saia v. New York*, 334 U.S. 558 (1948); *CBS, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Pacific Gas & Electric Co v. Public Utilities Comm'n*, 475 U.S. 1 (1986). *See generally* Ithiel de Sola Pool, TECHNOLOGIES OF FREEDOM (1983).

This appeal provides the Court with an opportunity to continue the process, begun in *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445 (1994), of clarifying the differing constitutional norms governing efforts to regulate speech and amplifying technology. In *Turner Broadcasting*, this Court considered the constitutionality of a congressional statute requiring cablecasters to transmit the signals of over-the-air broadcasters in an effort to protect broadcasters against possible "gatekeeper" abuse. Since the precise First Amendment impact of the statute on cablecasters was unclear, especially in settings where unused channel capacity existed, and since the trial court had failed to subject the government's factual justification for the so-called "must carry" rules to appropriately rigorous scrutiny, the *Turner Broadcasting* Court remanded the case for additional proceedings.

Under *Turner Broadcasting*, when government directly regulates the act of speech, either by imposing content-based restrictions or by directly impinging on the speech function, the statute must satisfy classic First Amendment scrutiny, including a factual showing that the regulation is necessary to advance a compelling state interest. When, however, government regulates amplifying technology in a manner that

does not unduly impinge upon the speech function, the statute must satisfy an intermediate level of scrutiny requiring a significant, but somewhat less demanding, factual justification.

Applying the *Turner Broadcasting* principles to the speech ban at issue in this case, we believe that the refusal to permit local telephone companies to function as vertically integrated speakers in their local communities is a direct regulation of speech triggering classic First Amendment strict scrutiny. But, it is equally important to note that the justifications offered by the government for §533(b) -- the risk of cross-subsidization and discriminatory behavior -- cannot satisfy any form of heightened First Amendment scrutiny because they are premised on speculation and conjecture. Far more than guesswork is required before the government may flatly forbid a speaker from using its own property to communicate with willing hearers. *City of Ladue v. Gilleo*, 512 U.S. __, 114 S.Ct. 2038 (1994). Moreover, Congress has made no effort to explain why the feared evils underlying the speech ban could not be forestalled by far less onerous alternatives. *Rubin v. Coors Brewing Co.*, 514 U.S. __, 115 S.Ct. 1585 (1995); *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989).

Permitting local telephone companies to function as full-fledged speakers is, however, only the beginning of this case. The scope and extent of permissible -- perhaps required -- government regulation of a telephone company's monopoly control over significant amplification technology must also be explored. In that regard, we believe that the need for "gatekeeper" regulation of the amplification technology at issue in this case is at least as powerful as in *Turner Broadcasting*, and may well call for a significant level of regulation designed to assure fair access to the technology by competing speakers.

ARGUMENT

BANNING LOCAL TELEPHONE COMPANIES FROM USING THEIR OWN PROPERTY TO AMPLIFY THEIR SPEECH VIOLATES THE FIRST AMENDMENT

A. The Relationship Between Speech And Amplifying Technology

In the era before Gutenberg, little attention was paid to the intersection of speech, law and technology, because primitive technology and mass illiteracy radically constrained a speaker's potential audience. With the invention of printing[7] and the emergence of vernacular language, efforts to control speech predictably centered on the new technology. Not surprisingly, the first great free speech document in the English language -- Milton's AREOPAGETICA (1644)[8] -- was a plea for unlicensed printing,[9] and the first great event in the American free speech tradition -- the 1735 acquittal of John Peter Zenger[10] -- arose out of the prosecution of a printer.

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[7] Gutenberg invented movable type in about 1450 in the city of Mainz. Louis Dudek, LITERATURE AND THE PRESS: A HISTORY OF PRINTING, PRINTED MEDIA AND THEIR RELATIONSHIP TO LITERATURE 14 (1960).

[8] John Milton, COMPLETE POEMS AND MAJOR PROSE 716 (Merritt Y. Hughes ed. 1957).

[9] Licensing of printing presses was initially imposed in London in 1530. It was abandoned in 1694. *See* Frederick S. Siebert, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776, at 46. *See also* Leonard W. Levy, EMERGENCE OF A FREE PRESS (1985); Jeffrey A. Smith, PRINTERS AND PRESS FREEDOM (1988).

[10] The *Zenger* trial is reported at 17 How. St. Tr. 675 (1735). James Alexander was the author of the words for which Zenger was tried. *See* Eben Moglen, "Considering Zenger: Partisan Politics and the Legal Profession in Provincial New York," 94 Colum.L.Rev. 1495 (1994).

In Zenger's day, as in Milton's, the speaker and the printer were separate entities. It was not until the invention of the rotary press in the 19th century that the speech and amplification functions were united in a single powerful speaker operating as an integrated economic unit -- the mass newspaper.[11] In the early 20th century, moreover, the perfection of three revolutionary amplifying technologies -- telephone, moving pictures, and broadcast -- raised fundamental questions about control of the new technology. In each setting, we were obliged to choose whether to continue the Zenger model (in which the speech and amplification functions are carried out by separate entities), or to adopt the mass newspaper model (in which both the speaker and amplification functions are merged in a vertically integrated economic unit).

In the motion picture context, we used vigorous enforcement of the anti-trust laws to prevent the emergence of a single motion picture entity with control over both production and amplification technology.[12] In the context of the telephone and telegraph, Congress opted even more con-

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[11] For a survey of the evolution of print technology, *see* Jonathan W. Emord, FREEDOM, TECHNOLOGY AND THE FIRST AMENDMENT (1991); and Colin Clair, THE HISTORY OF PRINTING IN BRITAIN 205-29 (1966).

[12] While motion picture producers were not wholly banned from owning theaters, they were precluded from controlling the distribution of their motion pictures to a mass audience. *See* Dana E. Roof, *et al.*, "Structural Regulation of Cable Television: A Formula for Diversity," 15 Comm. & L. 43, 59-65 (1993), for a survey of the enforcement of anti-trust law in the motion picture context. The critical early decision forced Thomas Edison to dissolve his Motion Pictures Patent Company because it gave him unfair control of the emerging technology. *See also United States v. Paramount Pictures, Inc.*, 1940-43 Trade Cas. (CCH) 288 (S.D. N.Y. 1940); *United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323 (S.D.N.Y. 1946), 70 F.Supp. 53 (S.D.N.Y. 1947), *aff'd in part and rev'd in part*, 334 U.S. 131 (1948).

clusively for the Zenger model, explicitly awarding monopoly control over amplification technology to the Bell system in return for a commitment to perform solely as a conduit, not a speaker.[13]

In the broadcast area, however, drawn by the success of newspapers as organs of mass communication, Congress encouraged the merger of the speaker and amplification functions in a single powerful economic entity -- the broadcaster. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)(refusing to permit local broadcast licensees to function solely as conduits for networks).[14]

Most recently, amplification technology has centered on the use of wires -- cable and telephone -- as a method of delivering speech to the home. The FCC initially viewed cable transmission as merely a means of clarifying the broadcast signal. *FCC v. Midwest Video Corp.*, 440 U.S. 689; *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Over time, however, cable broadcasters have been recognized as fully integrated speakers, with control over both the speaker function and the amplifying technology. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445.

By contrast, local telephone companies have been fro-

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[13] *See* Commerce Court (Mann-Elkins) Act, ch. 309, §7, 36 Stat. 539 (1910). The rise and fall of the Bell system is chronicled in Michael K. Kellogg, *et al.*, FEDERAL COMMUNICATIONS LAW 5-48 (1992). *See also* Robert W. Garnett, THE TELEPHONE ENTERPRISE: THE EVOLUTION OF THE BELL SYSTEM'S HORIZONTAL STRUCTURE, 1876-1909 (1985).

[14] *E.g.*, Radio Act of 1927, §18 (currently codified as §315 of the Communications Act of 1934)(current version at 47 U.S.C. §315 (1988). *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 703-04 (1979).

zen by law into the Zenger model. 47 U.S.C. §533(b). Under existing law, local telephone companies may function either as a speaker using someone else's amplification technology, or as an amplifier transmitting someone else's speech, but may not act as a vertically integrated speaker in their own communities. The precise question raised by this case, therefore, is whether government may require a would-be speaker to adopt the Zenger model of separate ownership and control of the speech and amplification functions.

B. The Power To Regulate Amplification Technology

As we gained experience in the 20th century with both the Zenger model and the vertically integrated model, we learned, first, that a government mandated separation of the speech and amplification functions in the form of a trade-off of monopoly control over amplification technology in return for a promise to act as a common carrier for the speech of others, can lead to technological stagnation and monopoly abuse. Accordingly, we dismantled the Bell system. *United States v. American Tel. & Tel. Co.*, 524 F.Supp. 1336 (D.D.C. 1981); *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). *See* Temin, THE FALL OF THE BELL SYSTEM (1987).

We also learned that powerful, vertically integrated speakers exercising control over significant amplification technology pose a threat to a robust free market in ideas in two ways. First, a vertically integrated speaker in control of a crucial amplification technology can become so powerful that it drowns out other voices. Second, a vertically integrated speaker may abuse its "gatekeeper" control over amplification technology by denying access to competing voices, or otherwise engaging in unfair competition. Accordingly, this Court has recognized that a vertically inte-

grated speaker may be subject to regulation to assure fair use of its amplification technology -- but may not be subject to direct regulation of the speaker function.

For example, newspapers, the original vertically integrated speakers, are subject to rigorous anti-trust regulations designed to prevent a single newspaper from exercising undue control over amplifying technology, but are free from virtually all efforts to regulate content. Compare *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Similarly, broadcasters, as vertically integrated speakers, are subject to anti-trust, cross-ownership, size and coverage regulations designed to assure fair access to the inherently scarce broadcast technology, without unduly burdening the broadcaster's speech function. *National Broadcasting Co. v. United States*, 319 U.S. 190; *Red Lion Broadcasting Co. v. United States*, 395 U.S. 367; *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978). Finally, in recent years, cablecasters have been subject to regulation of their "gatekeeper" power over access to cable technology, while remaining free to function as unregulated speakers. *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445.

The principal issue posed by this case is whether local telephone companies may be forbidden from joining newspapers, broadcasters and cablecasters as vertically integrated speakers.[15] In support of Congress' refusal to permit local

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[15] In one sense, therefore, this case is the obverse of *National Broadcasting Co. v. United States*, 319 U.S. 190, in which local broadcasters sought to function solely as conduits for the speech of network speakers. The Court ruled that the FCC was empowered to force local broadcast-

(continued...)

telephone companies to function as vertically integrated speakers, the United States argues that local telephone companies may be banned from functioning as both a speaker and an amplifier because they exercise monopoly control over the amplification technology over which much of the speech in question would flow. However, the mere existence of substantial control over amplification technology cannot itself be a basis for flatly refusing to permit an entity from functioning as both an amplifier and a speaker. Rather, it may justify, in appropriate circumstances, regulation designed to assure that other speakers enjoy fair access to the amplification technology.

It is, of course, true that local telephone companies exercise monopoly control over their local network of wires. As a practical matter, however, each category of vertically integrated speaker exercises substantial control over their respective amplification technologies. Cablecasters exercise a natural monopoly over local cable systems resulting in a single cablecaster serving the vast bulk of American homes.[16]

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[15] (...continued)
ers to exercise independent editorial discretion over network shows, thus compelling them to function as both speakers and amplifiers.

Here, Congress refuses to permit local telephone companies to function as both speakers and amplifiers. There is, of course, a world of constitutional difference between a regulation compelling a speaker to exercise editorial responsibility and a regulation forbidding a speaker from doing so.

[16] Although federal law prohibits the grant of formal monopolies to cable systems, fewer than one percent of existing cable systems face competition from a competing system. "Must Carry: Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation," 101st Cong., 1st Sess. 40 (1989). *See Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986).

Broadcasters exercise government-granted exclusive control over a finite number of wavelengths. *Turner Broadcasting*, 114 S.Ct. at 2457. Even newspapers, once intensely competitive, increasingly operate as local monopolies.

The United States contends, however, that the formal monopoly exercised by local telephone companies over amplification technology poses a heightened risk of abuse at three levels. First, the United States argues, the complex ratemaking process for local monopoly telephone service provides a fertile opportunity to cross-subsidize the telephone company's speaker functions by allocating speech costs unfairly to the telephone system. The net result of such an unfair allocation would be higher telephone rates and artificially low operating costs for the speaker function. Moreover, the government argues, to the extent the same wires are involved in both monopoly telephone service and speech transmission, the potential for accounting improprieties is significantly magnified.

Second, the United States argues, to the extent that other speakers must use the telephone company's system, either to transmit on its wires or to use its poles to string separate wires, permitting the telephone company to become a competing, vertically integrated speaker creates a potent motive to sabotage the transmissions of competitors.

Finally, although not explicitly pressed by the government, permitting a local telephone company to become a vertically integrated speaker risks the emergence of an extremely powerful speaker with so much influence over content that the free market in ideas may suffer in a given community. Presumably, that is why the waiver rules recently promulgated by the FCC in an effort to save the statute ap-

ply only in settings where a competing cablecaster is present.[17]

While the concerns over cross-subsidization and sabotage articulated by the government are serious and may well justify, if not compel, significant regulation of a telephone company's amplification technology, none of the government's arguments justify a flat refusal to permit a local telephone company to function as a vertically integrated speaker. Congress has failed utterly to demonstrate that the feared evils are even probable (let alone likely), as opposed to merely possible; and has failed utterly to explain why careful regulation of the amplification technology is not an adequate response to the risk of inappropriate behavior.

C. Speech May Not Be Banned On The Basis Of Assertions That Speech Has A "Bad Tendency" To Lead To Improper Behavior

The parties are in fundamental disagreement over the appropriate standard of review in this case. The United States argues that §533(b), as either a cross-ownership rule or a content-neutral regulation of technology, is subject to a relaxed form of intermediate scrutiny that requires the government to prove merely that it was reasonable for Congress to fear that telephone companies might behave improperly if permitted to act as vertically integrated speakers. Thus, the government argues that, at most, a relaxed form of intermediate scrutiny requires a showing that "the economic and predictive judgments underlying section 533(b) are reasonable."

The telephone companies, on the other hand, argue that §533(b), as a flat ban on speech, should be subjected to

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[17] *FCC Third Report and Order* (May 16, 1995).

strict scrutiny, requiring the government to prove, first, that telephone companies are almost certain to engage in improper conduct and, second, that no less drastic means exists to cope with the potential for misconduct.

Amici believe that §533(b) is a direct regulation of speech triggering classic strict First Amendment scrutiny. Unlike the regulation at issue in *Turner Broadcasting*,[18] §533(b) is openly designed to preclude a defined category of speaker from using its own property to amplify its speech. If Congress were to ban left-handed people -- or rich people -- from using their property to amplify their speech, the government would be obliged to submit its factual justification to withering judicial scrutiny. *Buckley v. Valeo*, 424 U.S. 1 (1976). Section 533(b) bans telephone companies, not left-handed people, from using their property to permit their speech to reach willing listeners. While the government's reasons for regulating telephone companies are, no doubt, stronger than its reasons for regulating left-handed people, the strict standard of constitutional review is the same. In both settings, the government is directly interfering with the desire of an identifiable category of speaker to use its property to transmit speech to a willing audience. If such a direct interference with speech is to be permitted, it must be because the government has proven (not merely asserted) an overwhelming social need.

It is, however, unnecessary to decide whether §533(b) should be subjected to strict scrutiny, or to the somewhat less rigorous intermediate scrutiny utilized in *Turner Broadcasting*, because the government's wholly speculative justifi-

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[18] The must carry rule at issue in *Turner Broadcasting* was designed to protect a category of speakers by assuring speaker access to an important amplification technology. Unlike §533(b), the must carry rule was not designed prevent cablecasters from functioning as vertically integrated speakers.

cations for the speech ban fail to satisfy any level of scrutiny associated with modern First Amendment protection. Although couched in the terminology of intermediate scrutiny, the reality of the government's position is to ask this Court to uphold §533(b) because it was reasonable for Congress to have feared that permitting local telephone companies to speak freely over their telephone wires might lead to attempts at cross-subsidization or sabotage.[19]

While such a prophylactic approach to the risk of future harm may be appropriate in other settings, the very essence of modern First Amendment protection precludes the government from banning speech as a prophylactic response to a speculative future evil. Since the government has made

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[19] Significantly, the Clinton Administration has taken a very different position in other forums. For example, in a White Paper on Communication Act Reforms, the Administration stated:

> Although the existing cable-telephone company cross ownership restriction of the 1984 Cable Act may have been appropriate when enacted, today it is an unnecessary and artificial barrier to competition in the delivery of video programming to American consumers and to investment in local infrastructure. The Administration's proposal to remove the current restriction, coupled with its proposals to promote competition in local telephone service, will allow telephone companies and cable operations to compete in providing a full range of video, voice and data services to the public. Such competition can promote investment that expands consumer choices and services.

The Justice Department's Antitrust Division has also reached the conclusion that §533(b) is no longer necessary as a check on the anticompetitive practices of local telephone companies. *Chesapeake & Potomac Telephone Company v. U.S.*, 42 F.3d at 188. As noted previously, the FCC now shares this view, as well. *See* p.3, *supra*. Given this broad administrative consensus, Congress would be hard pressed to defend the "reasonableness" of its judgment, even if that were the relevant constitutional standard.

no effort whatever to develop facts indicating that cross-subsidization or sabotage was a highly likely (as opposed to a possible) consequence of permitting local telephone companies to speak freely and, since the government has made absolutely no effort to explore methods of preventing the feared evils without resorting to censorship, the speech ban cannot satisfy any level of First Amendment scrutiny. *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445; *Sable Broadcasting Communications v. FCC*, 492 U.S 115 (1991).

The only standard of review capable of upholding §533(b) would be a return to the discredited "bad tendency" test last applied in *Gitlow v. New York*, 268 U.S. 652 (1925). Stripped of its rhetoric, the United States argues that permitting local telephone companies to speak over local telephone lines would have a "bad tendency" to encourage cross-subsidization or sabotage. Not since *Gitlow* has a flat ban on speech been sustained on the basis on such speculative predictive judgments.

Prior to the pathbreaking free speech opinions of Justices Holmes and Brandeis,[20] government was free to censor speech whenever the majority had a "reasonable belief" that speech had a "bad tendency" to lead to undesirable behavior. *E.g.*, *Abrams v. United States*, 250 U.S. 616); *Gitlow v. New York*, 268 U.S. 652. Justices Holmes and Brandeis recognized that the "bad tendency" standard was inadequate. The essence of modern free speech protection is a

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[20] *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616, 627 (1919)(Holmes and Brandeis dissenting); *United States ex rel. Milwaukee Soc. Democrat Publishing Co. v. Burleson*, 255 U.S. 407, 436-38 (1920)(Holmes, J., dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 337 (1920)(Brandeis, J., dissenting); *Pierce v. United States*, 252 U.S. 239, 272-73 (1920)(Holmes and Brandeis, JJ., dissenting); *Schuyler v. United States*, 251 U.S. 466, 482 (1920)(Holmes and Brandeis, JJ., dissenting); *Whitney v. California*, 274 U.S. 357, 372-78 (1927)(Brandeis and Holmes, JJ., concurring).

rejection of the bad tendency/reasonable belief test in favor of some form of heightened judicial scrutiny of a censor's claim that speech should be banned because it creates a risk of future harm.

In traditional speech contexts, the bad tendency/rational basis test has been supplanted by the rigorous "clear and present danger" test, requiring an almost certain causal nexus between speech and the harm it is alleged to cause. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In commercial speech contexts, the heightened causation standard is reflected by the requirement that a would-be censor demonstrate that censorship is "necessary" to "directly" and "materially" advance the asserted government interest. *Ibanez v. Florida Board of Accountancy*, 512 U.S. __, 114 S.Ct. 2084 (1994); *Edenfield v. Fane*, 507 U.S. __, 113 S.Ct. 1792 (1993); *Central Hudson Gas & Electric Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980). In cases involving regulation of a cablecaster's "gatekeeper" powers, the heightened causation standard requires a would-be censor to demonstrate a significant likelihood that its predictive judgments are correct. *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445.

Amici believe that the appropriate standard of review in this case -- whatever label is used -- reasonably requires the government to prove that the asserted evils of cross-subsidization and sabotage are almost certain to occur unless the speech is banned. But even if the somewhat less demanding standard applied in *Turner Broadcasting* is utilized, the government's unsubstantiated fears do not come close to demonstrating a clear likelihood that censorship is necessary to avert a serious evil. At most, the government has shown that a temptation to engage in unlawful activities would exist. But if government may prevent speech to avoid temptation, nothing is left of the great Holmes/Brandeis legacy.

D. Where, As Here, The Government Grants A Speaker Monopoly Control Over A Significant Amplifying Technology, Government May -- And Perhaps Must -- Assure Competing Speakers Fair Access To The Amplifying Technology

Modern, vertically integrated speakers perform two discrete tasks. First, they function as traditional speakers, crafting a message to be communicated to an audience. Increasingly, though, they also function as amplifiers, acting as conduits for their own speech, or for the speech of others.

It is, *amici* believe, crucial to distinguish between the speaker and the conduit functions. Efforts to regulate the speaker function directly implicate core First Amendment concerns and must satisfy exacting constitutional scrutiny. *E.g.*, *FCC v. League of Women Voters*, 468 U.S. 364 (1984). Where, however, regulation of the conduit function does not unduly impinge on the speaker function, the regulation may actually advance First Amendment concerns by assuring that diverse voices have access to modern forms of amplification technology.

Where, as in the newspaper context, a speaker's control over amplifying technology is the result of purely private activity, the government's power to regulate the technology in the name of fair access is strictly circumscribed. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Where, as in the cable context, a speaker's gatekeeper control over important amplification technology is, in part, the result of significant government cooperation,[21] narrowly

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[21] Cable systems require substantial cooperation from local governments in order to lay wires under the streets, or to erect and maintain an above-ground wire network.

tailored regulation of the gatekeeper function to assure fair access is permissible. *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445. Similarly, in the broadcast context, where control over amplifying technology is the result of a government decision to vest the technology in a finite number of licensees, regulations designed to assure access to the technology by divergent voices have been upheld. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *CBS, Inc. v. FCC*, 453 U.S. 367; *National Broadcasting Co. v. United States*, 319 U.S. 190. In the context of local telephone companies, where control over the amplification technology is the result of a government awarded monopoly, *amici* believe that regulations needed to assure fair access by divergent voices are not only permissible, they may well be mandated by the First Amendment.

The constitutional problem with §533(b) arises from the fact that it is not targeted at the amplification technology controlled by the local telephone companies but at their ability to function as First Amendment speakers. This statutory scheme, therefore, is very different than *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978), which upheld a cross-ownership rule that prevented a single speaker from gaining control of two significant forms of amplification technology in the same locality. Section 533(b) completely prevents a local telephone company from using its own property to speak at all in its local community. Under the NCCB cross-ownership rules, a speaker was forced to choose between control of two attractive amplification technologies. Once the choice was made, however, the speaker was free to operate as a vertically integrated speaker without restriction. Under §533(b), on the other hand, a local telephone company is not given a choice of amplifying technology. Section 533(b) flatly bans any effort to use cable or telephone wires to function as a speaker in its local community. Thus, its constitutionality should be

measured by the most stringent First Amendment standards -- a test that the government concedes cannot be met.

Once §533(b) is invalidated, though, the legal landscape is radically altered. At that point, local telephone companies are free to act as vertically integrated speakers, taking advantage of a government awarded monopoly over a significant amplification technology. Under these circumstances, it may well be appropriate to insist that such a government-aided speaker has a constitutional duty to make a significant portion of the amplification technology available to other voices, either by leasing channels, or by providing access to existing channels. *See Turner Broadcasting*, 114 S.Ct. 2445; *cf. Lebron v. National RR Passenger Corp.*, 513 U.S. __, 115 S.Ct. 961 (1995). The precise nature of the First Amendment duty of fair access imposed on a speaker enjoying a government granted monopoly over significant amplification technology, however, need not be resolved in the present case.

CONCLUSION

In considering the role of the First Amendment in an era of rapidly evolving technology, we are not forced to choose between the unpalatable extremes of broad government regulation over speech and virtual immunity from regulation. Instead, by precisely distinguishing between regulation of the speaker and regulation of the conduit, we can enjoy a carefully calibrated system of law that insulates speakers from content control while encouraging a diversity of speakers in the marketplace of ideas.

The judgment of the Fourth Circuit invalidating §533(b) should be affirmed.

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